

ACQUISITION REFORM TRAINING MODULE

Streamlining Acquisition of Commercial Items

- Key Definitions & Commerciality Determination

- Key Definitions & Commerciality Determination Exercise
- Market Research & Describing Agency Needs
- Market Research & Describing Agency Needs Exercise
- Streamlined Acquisition of Commercial Items
- Streamlined Acquisition of Commercial Items Exercise

6/4/96

Key Definitions & Commerciality Determination

1

Welcome to Streamlining Acquisition of Commercial Items.

The previous lessons covered Simplified Acquisition and Electronic Commerce. Another area where the Federal Acquisition Streamlining Act (FASA) of 1994 is having a significant impact is in the acquisition of commercial items.

On October 1, 1995, changes to the Federal Acquisition Regulation (FAR) implemented fully the commercial item emphasis of FASA. These changes mandate a preference for the acquisition of commercial items. These three lessons will cover those changes including presolicitation and new solicitation activities. The primary sources of information for this briefing are:

The Federal Acquisition Streamlining Act (FASA) of 1994.

FAR Case 94-790.

Interviews with FAR Case team members.

FAC Number 90-32.

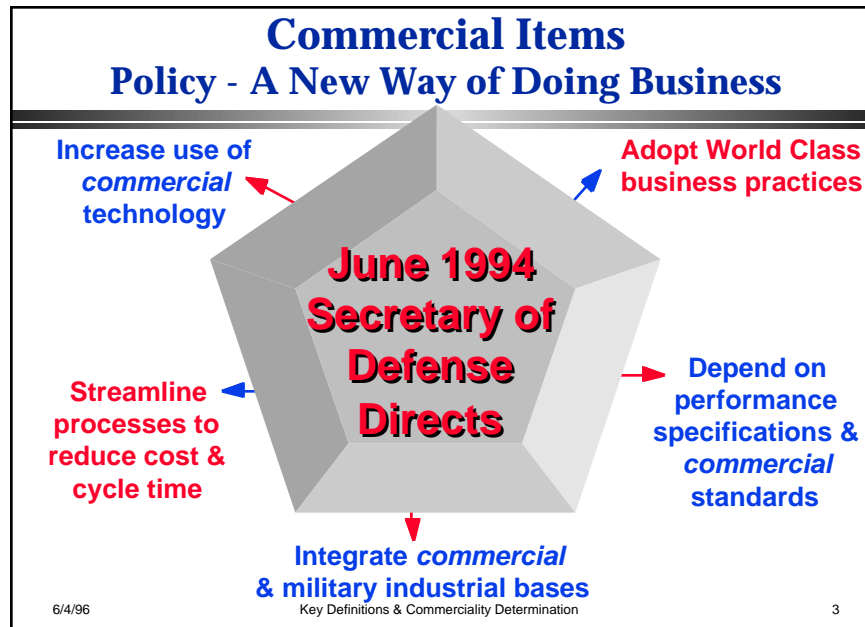


Our focus for the next hour will be on the definitions, planning and decision-making that relate to commercial items.

The objectives are to:

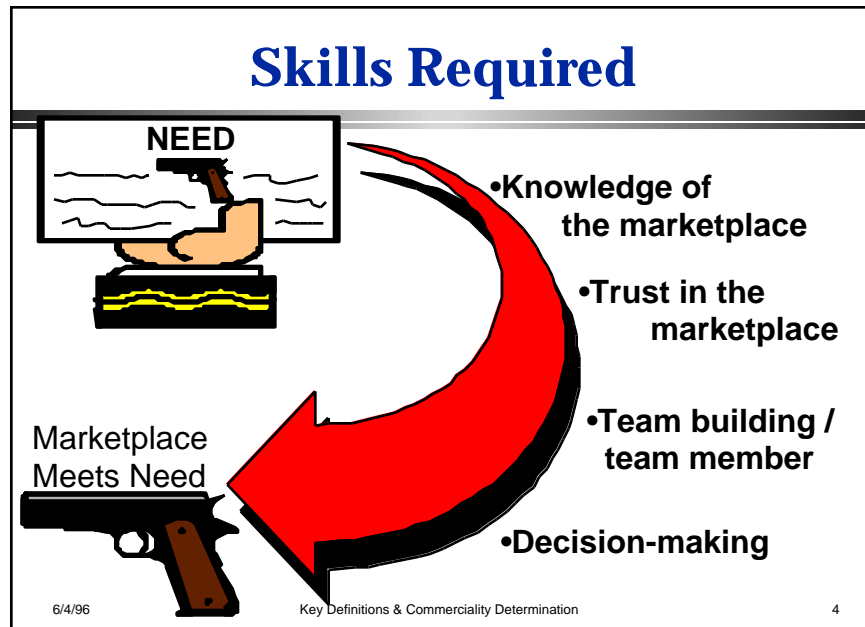
- Understand the Government's emphasis on commercial items.
- Understand the FAR definition of a commercial item.
- Understand the FAR definition of a nondevelopmental item.
- Use sample market research and user need information to:
 - a. Compare the given information to the key definitions.
 - b. Identify the procurement alternatives.
 - c. Make a commerciality determination.

Understanding these changes gives you decision-making responsibilities that are the cornerstone of these commercial item initiatives. Individuals and teams will now have increased capability to meet a user's need in the commercial marketplace using customary market practices vice government-imposed practices whenever possible. Empowering you to make choices and tailor the acquisition is intended to reduce cycle time, cut cost, increase quality, reduce paperwork & ensure timely delivery of the product to your customer.



The Secretary of Defense (SECDEF) has been a leading proponent of the use of commercial items in DoD. Even as Congress was working on FASA 94, SECDEF directed DoD to begin removing barriers that might potentially impede the acquisition of commercial items.

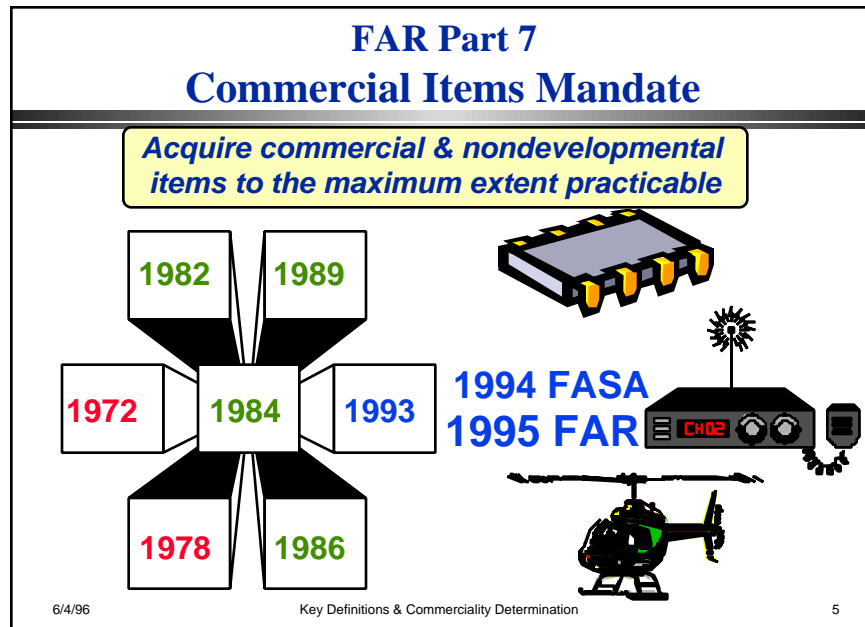
The word “commercial” has become an integral part of the future of the defense acquisition strategy and is touched upon in almost every aspect, from technology to performance specifications and standards. The emphasis on buying commercial is a matter of law, regulation and policy. With FASA and the new FAR, the Federal Government is speaking with one voice.



Customer satisfaction is an important aspect guiding the move toward the use of commercial items. It changes the focus away from telling the contractor “how to” design, develop, test, produce and deliver a product to one that encourages innovation and promotes efficiency.

Achieving success in the commercial marketplace has traditionally depended on satisfying the customer. Teamwork, quality and an integrated product development and delivery system are stressed. Management continually looks for new and better products and for better ways to produce, package, market and service those products. These are the type of activities of which the Government seeks to take advantage and to incorporate into the way it does business. Directly related to this lesson are the Acquisition Reform Principles of empowering people to manage -- not avoid risk, reducing cycle time by 50 percent and expanding the use of commercial products and processes.

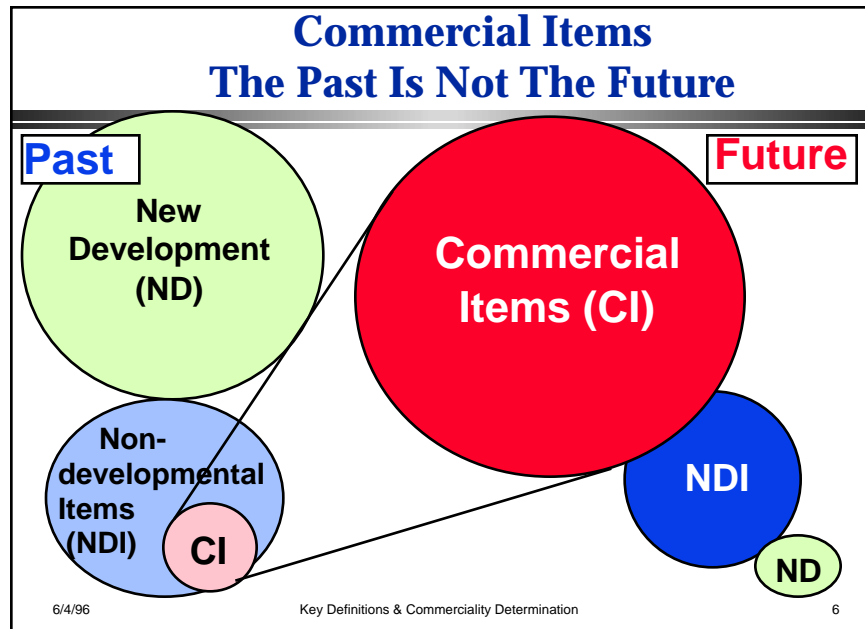
To achieve these principles, we need to understand the user’s legitimate requirements, to acquire knowledge about the marketplace, to learn when to trust the commercial marketplace, to build working relationships and to realize that individually or collectively, we are now decision makers in the acquisition process. The decision we will look at most closely in this lesson is the commerciality determination.



For over 20 years, the Federal Government has attempted to access the commercial marketplace but was restrained by statutory barriers. This all changed in 1993 when Section 800 of Public Law 101-510 created a panel to analyze the history of Government policies in this area. Backed by the full support of Congress and the Executive Agencies, the “Section 800 Panel” sent an extensive list of recommendations on promoting the use of commercial items to Congress.

In 1994, many of the 800 Panel recommendations were incorporated into the Federal Acquisition Streamlining Act of 1994. Some statutory barriers to the acquisition of commercial items were removed. A new, broad statutory definition of commercial items was established. The new commercial item procedures give the contracting officer increased flexibility to negotiate a mutually satisfactory business arrangement that is appropriate for the item being acquired.

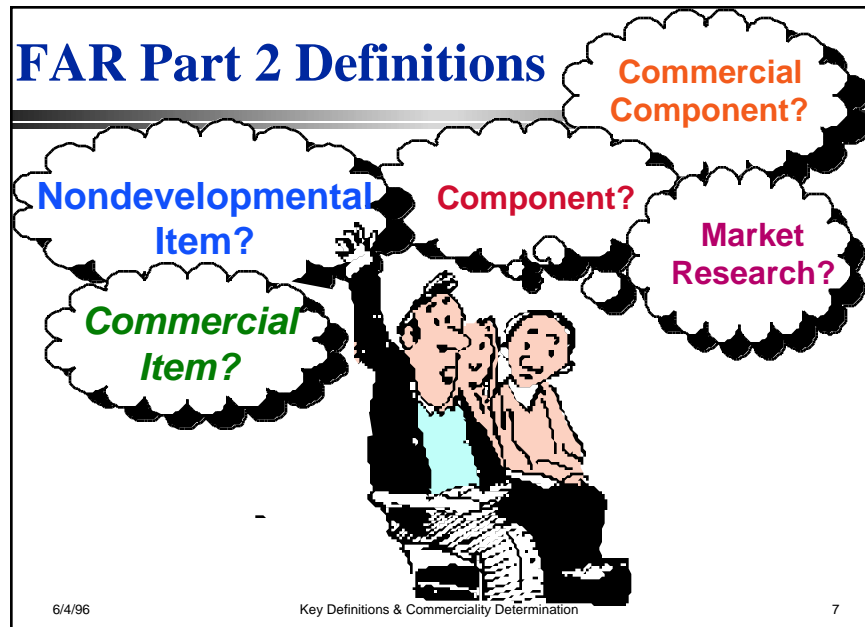
Effective October 1, 1995, FAR Part 7 implements FASA 94 with the statement: “Agencies shall perform acquisition planning and conduct market research for *all* acquisitions in order to promote and provide for acquisition of commercial items, or, to the extent that commercial items suitable to the agency’s needs are not available, nondevelopmental items to the maximum extent practicable.”



In the past, terminology was very confusing. There were nondevelopmental items, commercial-off-the-shelf, commercial product, commercial-type product -- any number of designations of which only two were defined in the FAR. The emphasis was on new development; commercial items were almost a last resort, a subset of nondevelopmental items.

In FAR Part 7, commercial items are clearly preferred over nondevelopmental items. And, nondevelopmental items are the choice over new development. There is also a clear distinction between CI and NDI with only one area of overlap in which a nondevelopmental item can be a commercial item.

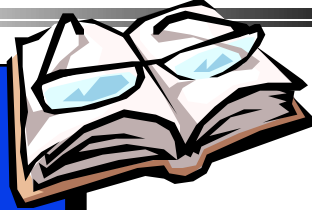
In summary, the law and the regulation both state that the use of commercial items is the preferred option. The FAR directs the competition advocate and agency heads to make it happen.



We will now take a closer look at these new definitions beginning with commercial items and nondevelopmental items. The definition of a commercial item has eight parts. There are three parts to the definition of a nondevelopmental item. Understanding these definitions is crucial to the identification and procurement of commercial items.

Commercial Item Definition

Any item,.....,
of a type
customarily
used for
nongovernmental
purposes



6/4/96

Key Definitions & Commerciality Determination

8

The definition of a commercial item begins as follows:

“(a) Any item, other than real property, that is of a type customarily used for nongovernmental purposes and that...”

Any item... means just what it says, any item being acquired by the Government.

Of a type... this is best explained by using an example. The manufacturer of a four-drawer file cabinet makes an “item of a type” which is file drawers. If the Government needs five-drawer file cabinets instead of four, this manufacturer would be a logical source since they make the same type of item -- which is file cabinets.

Customarily used... means the use is established by custom, common practice or habit.

For nongovernment purposes... means the item is used commercially. It is not unique to the Government.

Commercial Item Definition



**Any item,.....,
of a type
customarily
used for
nongovernmental
purposes**

**Currently available
to the *general public***

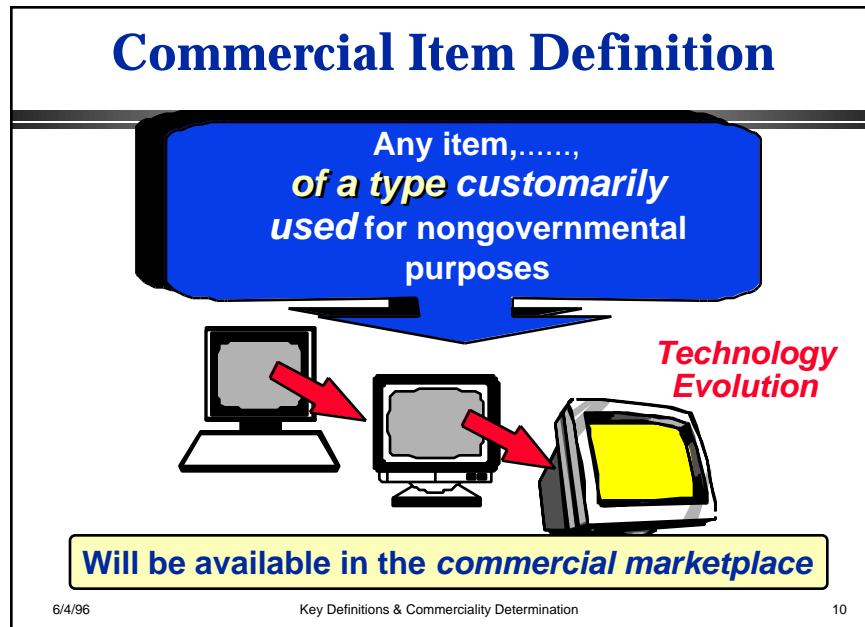
6/4/96 Key Definitions & Commerciality Determination 9

The first part of the definition also specifies that an item of a type...

- “1. Has been sold, leased, or licensed to the general public; or
- 2. Has been offered for sale, lease, or license to the general public. “

This first part of the eight-part definition of commercial item establishes that the item exists and has been made available to the general public. It also establishes that the general public can acquire the item by at least three different methods.

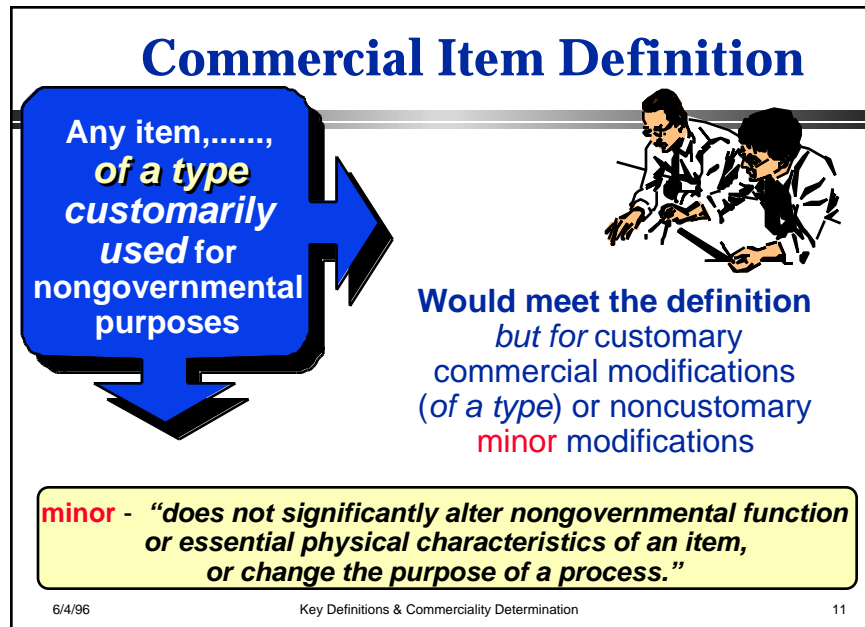
Even if no sale has been registered, the contracting officer can make a determination that an item qualifies as a commercial item based on the fact that it is currently available and/or has been offered for sale, lease or license to the general public.



Part two of the definition says...

“(b) any item that evolved from an item described in paragraph (a) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a government solicitation;”

This paragraph allows the Government to take advantage of evolving technology and product improvements in cases where an item is not currently available for use by the general public. The new FAR says that as long as the item evolves from something that already meets the test for a commercial item and *will be available* to the public in time to meet the delivery schedule of the Government, it can be considered a commercial item.

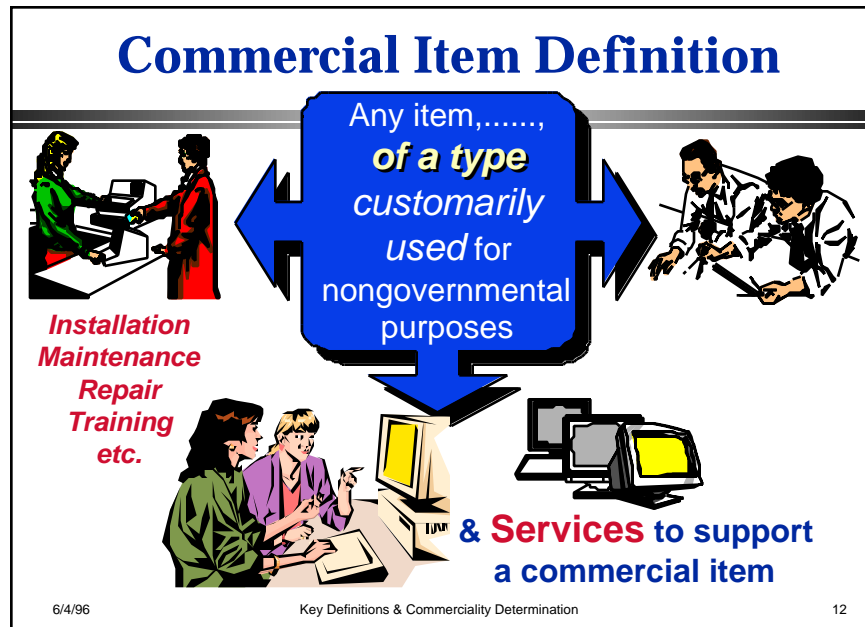


Part three deals with modifications. “... (c) Any item that would satisfy a criterion expressed in paragraphs (a) or (b) of this definition, but for...

- (1) Modification of a type customarily available in the commercial marketplace; or,
- (2) Minor modifications of a type not customarily available in the commercial market place made to meet Federal Government requirements.”

This part of the definition says that an existing commercial item can be modified within limits to meet a user’s performance need as long as the modified item can meet the user’s schedule need as well. The modification limits are established as customary or minor. Customary modifications do not pose the challenge to the market viability of the item that minor modifications impose. Therefore, minor modifications are further defined as those that “do not significantly change the nongovernmental function or basic physical characteristics of an item, or the purpose of a process.”

Some factors that may be considered in deciding what is “minor” are the value and size of the modification versus the value and size of the final product. Cost and percentages can be used in making the assessment, but are not necessarily proof that a modification is minor. The key to determining what is “minor” is the definition.



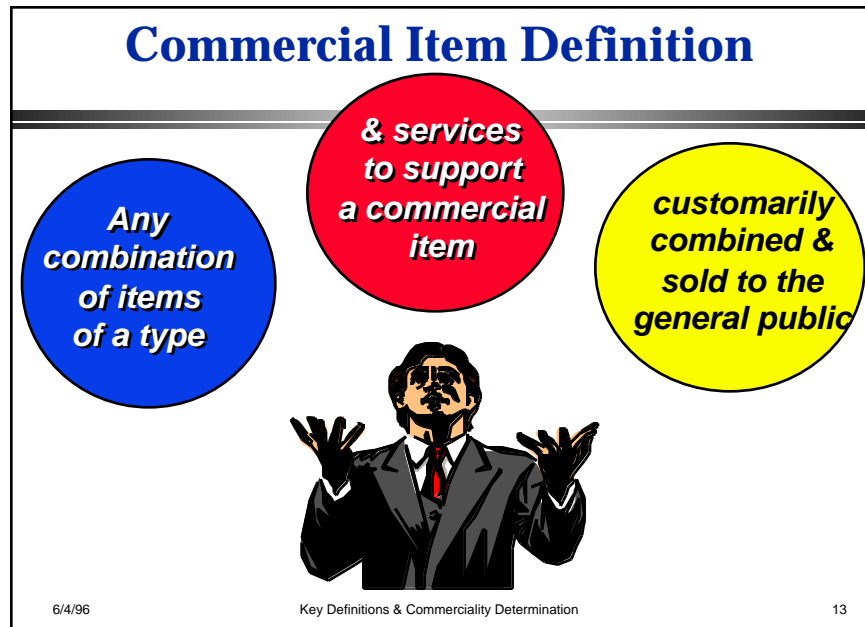
We're going to skip part four of the definition for just a minute and talk about part five which says...

...(e) "Installation services, maintenance services, repair services, training services, and other services if such services are procured for support of an item referred to in paragraphs (a), (b), (c), or (d) of this definition, and if the source of such services--

(1) Offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions; and

(2) Offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public;"

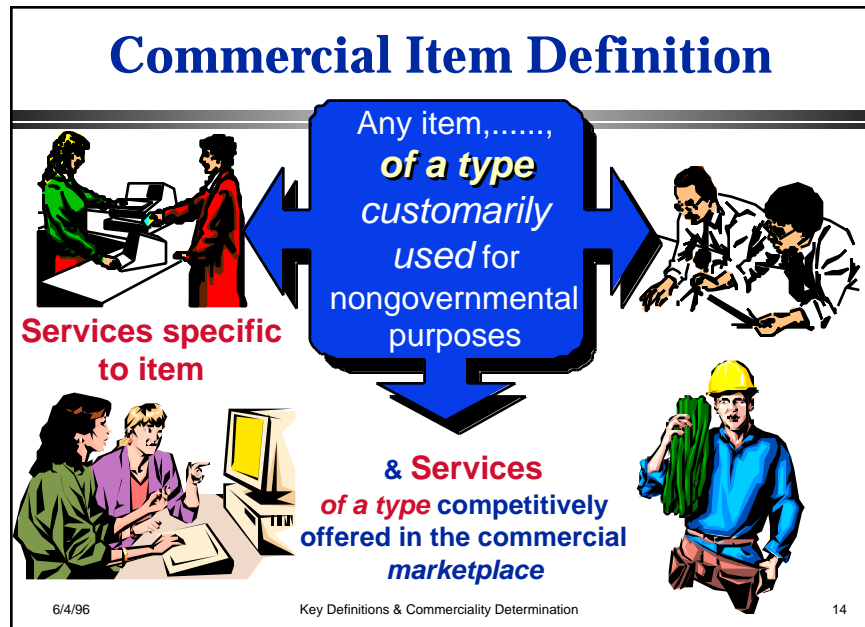
This is a very important point because it is a new concept. Services that are needed to support a commercial item are commercial items themselves if they are offered to both the public and the Government under similar terms and conditions and use the same workforce or employees to perform the services. So, if the Government purchases a computer, for example, the installation, maintenance, repair, etc. would also be commercial items as long as they comply with the qualifiers in paragraphs (1) and (2) above.



Now, we will go back and pick up the fourth part of the definition which refers to part five which we just covered. A commercial item means...

...(d) "Any combination of items meeting the requirements of paragraphs (a), (b), (c), or (e) of this definition that are of a type customarily combined and sold in combination to the general public;"

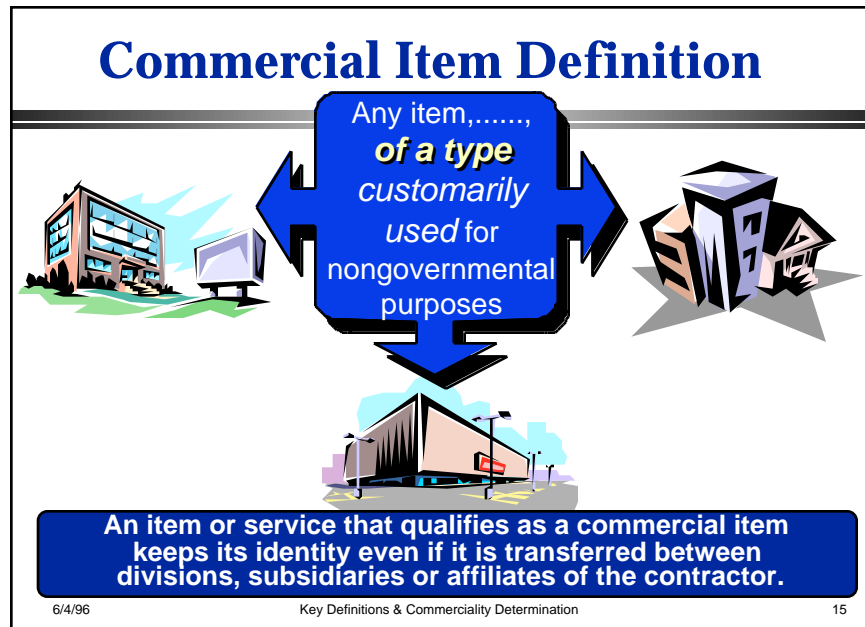
When a commercial item and commercial service are mixed and matched, the outcome is a commercial item. For example, you purchase a computer package that includes the computer, software, training and repair and maintenance services. Under the new FAR regulations, the *package* becomes a commercial item.



Part six of the definition covers...

...(f) "Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed;"

Services that are independent of and/or unrelated to commercial item hardware and software can be commercial items if they are offered and sold to the general public at a price that is generally accepted as a standard by the industry for specific tasks that are performed under normal commercial terms and conditions. This does not apply to services provided on an hourly basis for which there is no pre-established catalog or market rate.



The seventh part of the definition of a commercial item is...

...(g) "Any item, combination of items, or service referred to in paragraphs (a) through (f), notwithstanding the fact that the item, combination of items or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor;"

In other words, a commercial item is still a commercial item if it meets all the parameters we've covered, even though it moves from one division of the company to another.



The eighth and final part of the definition of a commercial item deals with nondevelopmental items. It says that a nondevelopmental item can be a commercial item if...

...(h) “the procuring agency determines that the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple state and local governments”.

It is important to note that when these criteria are met, a nondevelopmental item becomes a commercial item. The reverse is not true. A commercial item can not become a nondevelopmental item.

This is the only part of the commercial item definition that does not require an item to be available to the general public. However, it is consistent with many of the same elements that guide the commercial item philosophy such as being developed at private expense and sold in quantity at competitive prices to multiple users. If used properly, an NDI that meets the definition of a commercial item can help the Government reap the benefits of private sector technology and established production lines and processes. In addition, the Government can get a quality product at market price and have some reasonable level of confidence in the contractor’s distribution and support capabilities based on their track record of providing the item to other governmental entities.

Commercial Item Definition Summary

-
1. Item of a type
Currently available
 2. Evolving Item
Will be available
 3. Modified Item
Would be available
 4. Commercial Item
Package
 5. Services in
Support of
Commercial
Items
 6. Other Services
of a type
 7. A CI retains
its identity
 8. An NDI can be a
commercial item

6/4/96

Key Definitions & Commerciality Determination

17

We will talk about nondevelopmental items in just a few minutes. But, first, let's review the eight parts of the commercial item definition.

This slide summarizes the eight parts of the definition of a commercial item. Parts (1), (2), and (3) relate to the capability of the product (be it hardware or software) to meet the user's performance needs and the capability of the contractor to meet the user's schedule and quantity needs.

Part (5) reminds us that services in support of a commercial item are also commercial items. Part (4) indicates we can mix and match commercial hardware, software and services and still have a commercial item.

Part (6) establishes that services of a type totally unrelated to parts (1) through (5) are also commercial items if stated conditions are met.

Finally, we see that a commercial item retains its identity as it moves around a contractor's facilities (7) and that in certain instances a nondevelopmental item (8) can be a commercial item.

Commercial Items - Examples



6/4/96

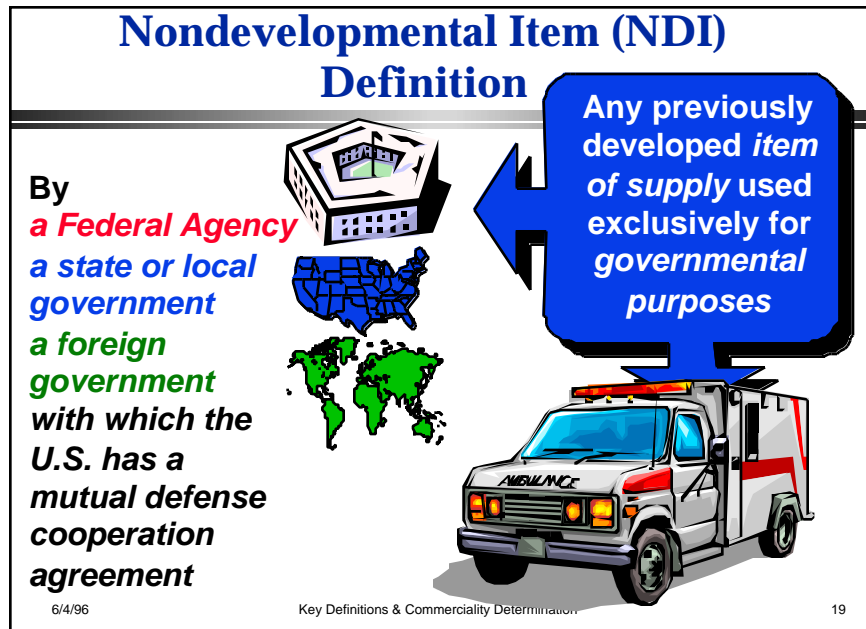
Key Definitions & Commerciality Determination

18

Here are some examples of commercial items.

As you think of others, remember that the decision as to whether an item is commercial or not has to be made on a case-by-case basis applying the principles outlined in the FAR. The two key elements are the capacity and capability of the commercial marketplace to meet the user's needs.

Remember, the objective of emphasizing the use of commercial items is to get the best available product, at the best cost, in less time. We are definitely making a "best value" determination.

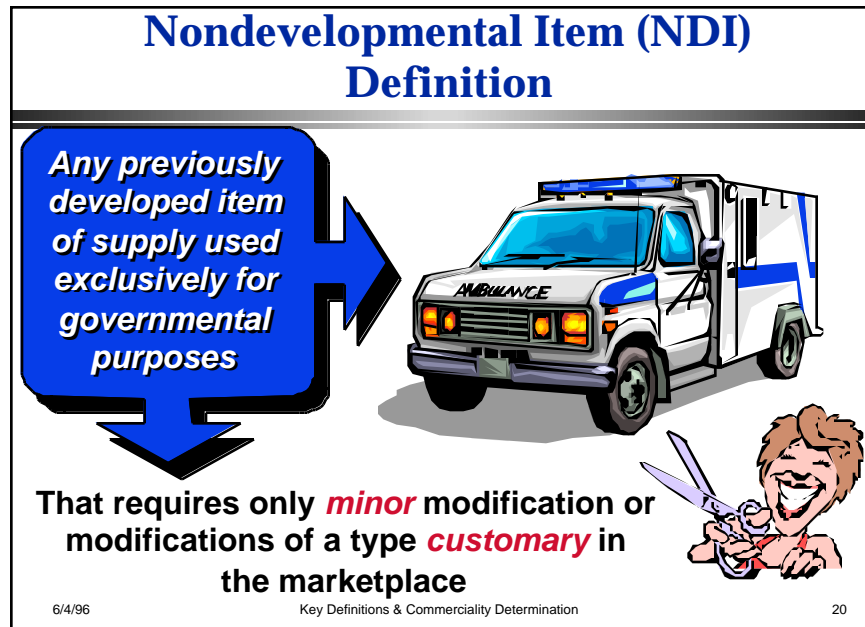


Now, let's look at the first part of the three-part definition of a nondevelopmental item:

...(a) "Any previously developed item of supply used exclusively for governmental purposes by a Federal Agency, a state or local government, or a foreign government with which the United States has a mutual defense cooperation agreement;"

Notice the similarities and contrasts between this definition and that of a commercial item. For example, the word "any" has the same meaning, inclusive, when applied to nondevelopmental items as it did when applied to commercial items. It includes all items of supply developed expressly for government use that may meet the user's need. "Item of supply" refers to any item in the Government inventory be it a Federal, state, local or foreign government while the commercial "item of a type" refers to the commercial marketplace. In this part of the definition, item of supply also implies currently available.

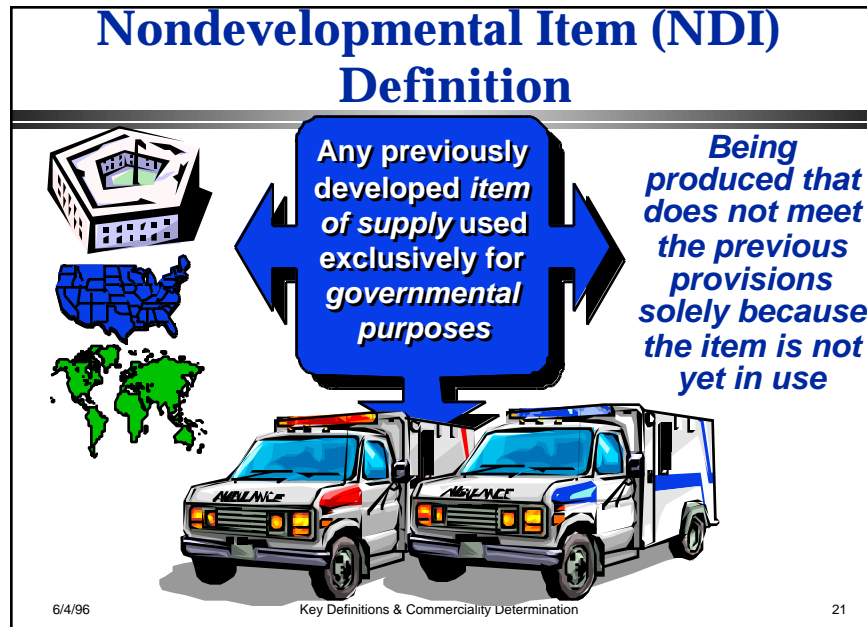
The definition for nongovernmental items states that the item has been used exclusively for Government purposes while the definition of a commercial item clearly states for nonGovernment purposes. And, the reference to use by Federal, state, local or foreign governments is in contrast to the "sold to or offered for sale to the general public" criteria for commercial items.



A nondevelopmental item is also...

...(b) "Any item described in paragraph (a) of this definition that requires only minor modification or modifications of a type customarily available in the commercial marketplace in order to meet the requirements of the procuring department or agency; or"

This part says an item of supply can be modified to meet an agency's performance need as long as it would be available in time to meet the agency's schedule need. "Minor" was defined as part of the commercial item definition. To apply here, it would have to be stated like this: "minor" means modifications that do not significantly alter governmental function or essential physical characteristics, or change the purpose of a process.



...“(c) Any item of supply being produced that does not meet the requirements of paragraph (a) or (b), solely because the item is not yet in use.”

This provision keeps the door open to the possibility of a Nondevelopmental Item solution to a need. It basically says that an item on a production line that has been designated an item of supply is a nondevelopmental item even though it is not currently available. This situation is as close as the nondevelopmental item definition could get to the technology evolution part of the commercial item definition. Remember the object is to keep the door open to a nondevelopmental item solution if it has been closed to a commercial item solution.

--NEXT SLIDE--

Nondevelopmental Item Example



6/4/96

Key Definitions & Commerciality Determination

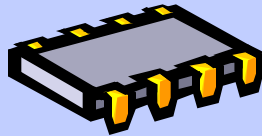
22

This is an example of a nondevelopmental item, both the fire engine itself and much of its equipment.

In looking at a nondevelopmental item, remember we are still trying to achieve the same end result as if a commercial solution was used. We want the best value we can attain in the performance-cost-schedule relationship within which we have to operate.

Component Definition

Component - Any item supplied to the Federal Government as part of an end item or of another component.



Component?



6/4/96

Key Definitions & Commerciality Determination

23

There are just a few more definitions you need to know in FAR Part 2 in order to have the background necessary to make a commerciality determination. The first is “component”. It is defined as...

...“any item supplied to the Federal Government as part of an end item or part of another component”.

A component is not a commercial item. This definition is included in the FAR in recognition that components that do not meet the criteria to be commercial nor nondevelopmental items do exist.

Commercial Component Definition

Commercial Component- Any component that is a commercial item.

Commercial Component?



6/4/96 Key Definitions & Commerciality Determination 24

When you put “commercial” in front of “component”, you have an item that meets the parameters of the commercial item definition. Therefore, a commercial component is a commercial item.

Market Research Definition

Market Research means

- **collecting and analyzing information about the capabilities within the market to satisfy agency needs**



6/4/96

Key Definitions & Commerciality Determination

25

Market research is the key to determining whether a need can be met by a commercial item or a nondevelopmental item, or whether new development will be required. Market research is an action taken to satisfy a need.

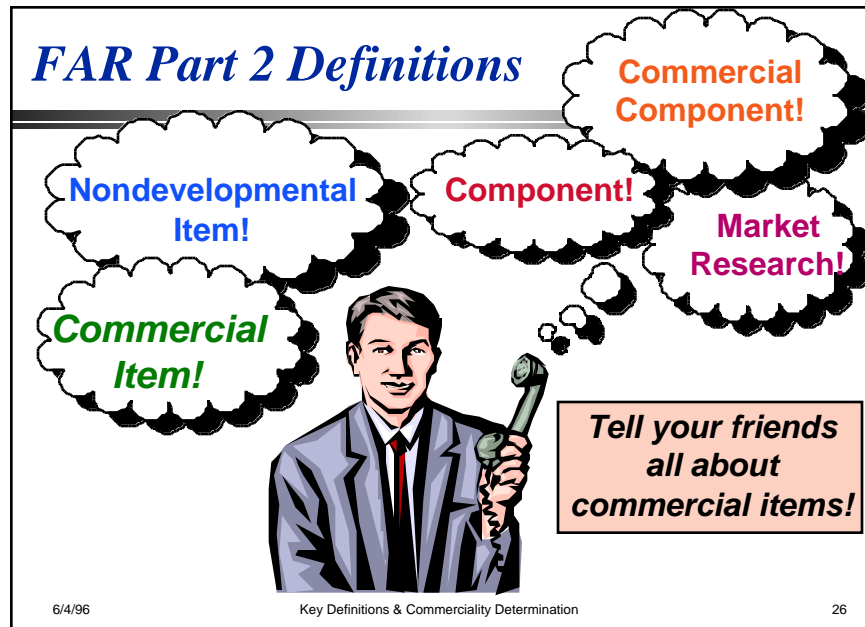
Key terms in the definition are:

Collecting and analyzing...which means gathering information from many sources and comparing what is available from one source to what is available from others.

Within the market...which means learning about the market, its products and its business approach.

Market capabilities versus agency needs...which means you have to know where your agency is going in order to relate what you find out about the market to your agency's needs.

We will be spending much of the next lesson on market research. Remember, FAR Part 7 requires market research to promote and provide for acquisition of commercial items. If a commercial item is not available, the next choice would be a nondevelopmental item.



We have completed our discussion of these definitions with emphasis on commercial and nondevelopmental items. Some of the key phrases were:

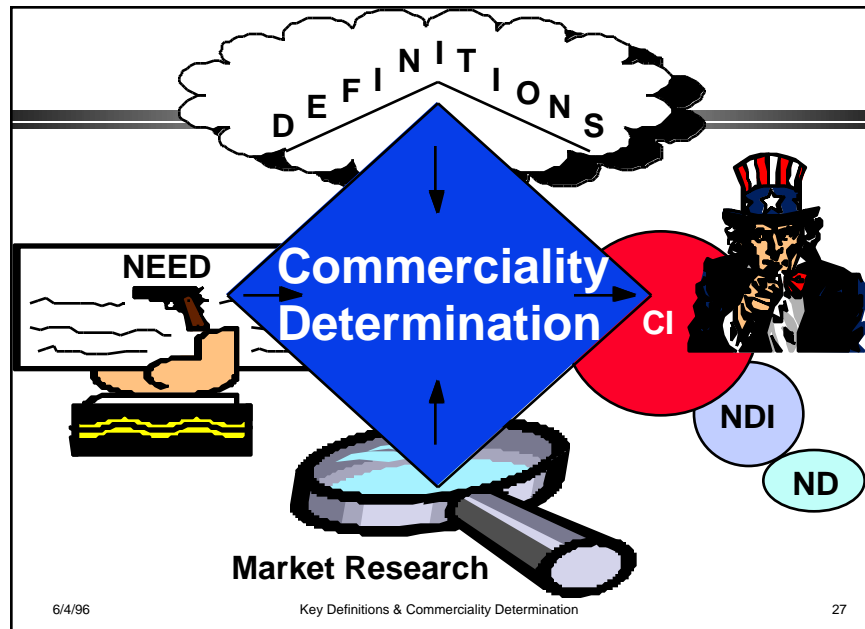
For a commercial item...

- Of a type.
- Customarily used for nongovernmental purposes/general public.
- Currently available/evolved/will be available.
- Commercial marketplace.
- Customary modifications/minor modifications.

For a nondevelopmental item...

- Item of supply.
- Exclusively for governmental purposes.
- Customary modification/minor modifications.
- Currently available/will be available.

Missing from this slide is the term “new development.” Basically, new development is major modifications to commercial or nondevelopmental items, or development of new items.



We have discussed FAR Part 7 which mandates the use of commercial and nondevelopmental items and reviewed all of the key definitions that apply to commercial items in FAR Part 2. We also defined new development as major modifications to commercial or nondevelopmental items, or development of new items. The definitions coupled with information from our user's need and our market research will give us the data we need to make a commerciality determination. We'll begin by looking at an example outlined in the handout titled "Drill Rig". Review the information on the user's need and the market research and compare it to the definitions we just covered. Then identify the procurement alternatives and make a commerciality determination.

Work independently and document your answer on the worksheet on the next page. We will discuss your answers in approximately 8 minutes.

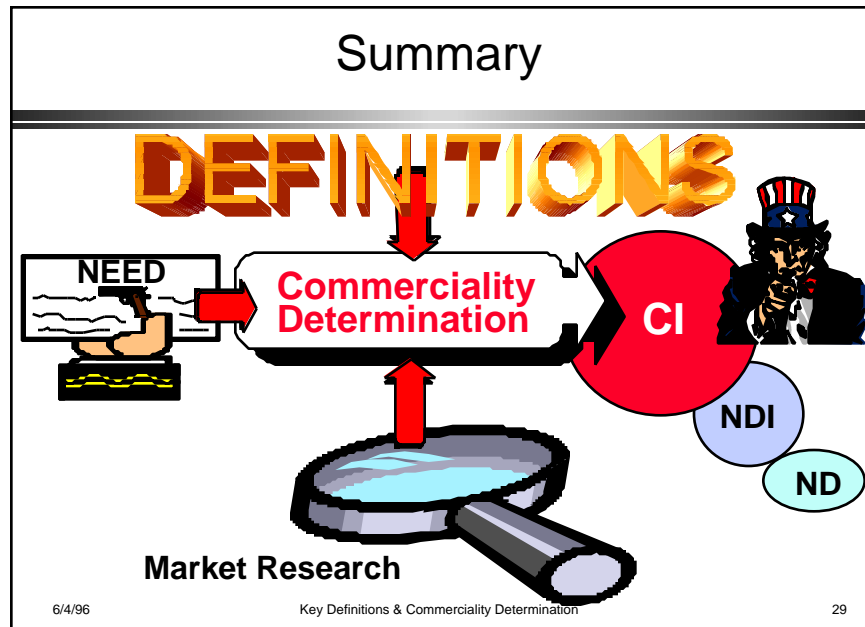
COMMERCIALITY DETERMINATION WORKSHEET		
CASE/LET	COMMERCIALITY DETERMINATION	REMARKS (WHY?)
Drill Rig		

6/4/96

Key Definitions & Commerciality Determination

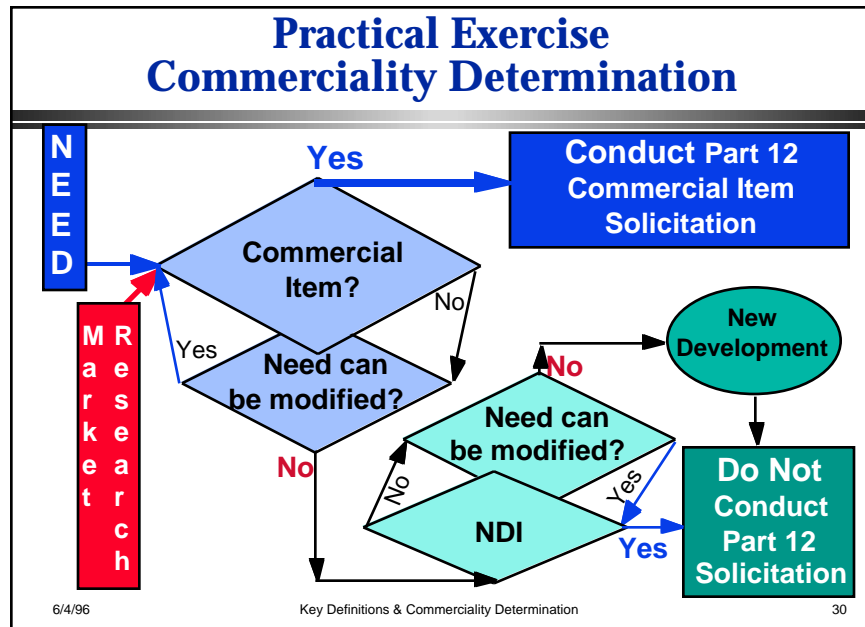
28

This worksheet is similar to the briefing template you will use when you do the practical exercise.



We have covered the mandate to give preference to commercial items, the key definitions relative to commercial items, and the commerciality determination that has to be made. The intent of these changes to the FAR was to empower people to manage -- not avoid risk, to reduce cycle time by 50 percent and to expand use of commercial products and processes.

We will now apply our understanding to a series of caselets similar to the exercise we just completed.



For this exercise, your work group will be considered the competition advocate, one of two parties designated by the FAR to promote commercial items.

For each of the 14 caselets, you will need to make a commerciality determination. There are only three choices:

- Commercial item.
- Nondevelopmental item.
- New development.

“Need can be modified” is an interim step which is why it is nested on the slide with commercial item and nondevelopmental item.

Use this decision tree to assist you in the exercise. For each caselet, review the **need** and **market research** information. Compare it to the key definitions and make a commerciality determination. Document your determination and rationale on the worksheets similar to the one on the next slide.

Commerciality Determination Worksheet & Briefing Template		
CASELET	COMMERCIALITY DETERMINATION	REMARKS (WHY?)

6/4/96

Key Definitions & Commerciality Determination

31

Answers to one or two caselets can be recorded on each worksheet; if you need more worksheets, they can be provided.

There is also a set of master worksheets in each break-out room. Once all the work has been completed, transfer the information to the master worksheets and convert them to viewgraphs. The viewgraphs will be used to brief in the plenary session.

Spend approximately ten minutes on each caselet...but no more than 15 minutes. We will reserve the last 30 minutes of the exercise for the briefing.

We have to begin the plenary session on time to cover the 14 caselets in 30 minutes. Please return to this classroom from your break out areas about 3 to 5 minutes before the solutions are to be briefed. Thank you.